UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JULIE GREENBANK, Plaintiff,	)	
v.	)	Civil Action No. 3:18-cv-239-SEB-MPB
GREAT AMERICAN ASSURANCE COMPANY, Defendant.	)	

GREAT AMERICAN ASSURANCE COMPANY'S MOTION IN LIMINE FOR RULING FINDING ADMISSION OF NON-DISPUTED FACTS

Plaintiff failed to properly contest any facts contained in Great American's Motion for Summary Judgment, and those facts are accordingly admitted without controversy in this matter pursuant to Local Rule 56-1. Local Rule 56-1 is unequivocal: "a party opposing a summary judgment motion . . . **must** include a section [in the response] labeled 'Statement of Material Facts in Dispute' that identifies the potentially determinative facts and factual disputes that the party contends demonstrate a dispute of fact precluding summary judgment." (Emphasis added). The effect of a party's failure to comply with Local Rule 56-1 is that the movant's uncontested facts may be "admitted without controversy" – not only for purposes of summary judgment, but also for the entire dispute, including trial. *See Ello v. Seven Peaks Marketing Chicago, LLC*, 2:14-CV-299-TLS-JPK, 2019 WL 3956186, at *5 (N.D. Ind. Aug. 21, 2019) (granting defendant's motion to establish facts at trial due to plaintiff's failure to contest facts at summary judgment phase).

Between July 2019 and March 11, 2020, the parties engaged in an extensive summary judgment briefing phase. While Great American specifically identified and controverted Plaintiff's factual assertions with admissible evidence,[1] Plaintiff failed to properly contest any of

[1] *See* Great American's Combined Brief in Response to Plaintiff's Cross-Motion for Partial Summary Judgment and Reply in Support of Defendant's Motion for Summary Judgment ("Great American's Combined Summary Judgment Brief"), Dkt. No. 95.

Great American's factual assertions at any point in her numerous pleadings. Because Plaintiff failed to comply with Local Rule 56-1 and did not contest Great American's factual assertions in its Motion for Summary Judgment, those facts should be deemed "admitted without controversy" and the Court should preclude Plaintiff from attempting to contest them at trial.

I. Procedural posture

After extensive briefing at the summary judgment phase, the Court dismissed Plaintiff's primary contract and bad faith claims against Great American.[2] The Court reasoned that the parties had not addressed whether another contract claim might exist based on Plaintiff's allegation that Great American wrongfully approved a tenotomy; however, the Court further advised that Plaintiff should "consider the viability of this claim before pressing forward with it in light of our ruling on the permitted use provision."[3] Specifically, in its Order, the Court concluded that Plaintiff offered no "explanation as to why Great American would have been required to consider Thomas's 'use' when deciding his course of treatment . . . absent coverage for 'loss of use,'"[4] and further rejected Plaintiff's contention that the "permitted use" provision of the Policy "entitle[d] [Plaintiff] to insurance coverage for Thomas's use as a show horse."[5]

Besides these contract and bad faith claims, the Court also dismissed Plaintiff's state law claims for theft and conversion related to Great American's treatment of Thomas.[6] In addition to the issue of Great American's approval of the tenotomy as described above, Plaintiff also maintains a claim for breach of contract arising from Great American's rejection of Plaintiff's request to renew her Policy, and a contract/bad faith claim arising from Great American's denial of a small

[2] *See* Court's Summary Judgment Order, Dkt. No. 123 at PageID No. 7060; 7062-7063; 7075-76.
[3] *See id*. at PageID No. 7058, n. 20.
[4] *See id*. at PageID No. 7058.
[5] *See id*. at PageID No. 7057-58.
[6] *See id*. at PageID No. 7075-76.

portion of Plaintiff's medical expenses.[7] Additionally, Plaintiff maintains tort claims for fraud related to Plaintiff's purported "Policy rights," for conversion related to Great American's retention of Plaintiff's premium payments for her short-term renewal policy in the amount of $1,943.00, and for criminal mischief and negligence related to Plaintiff's allegation that Great American damaged Thomas after the termination of the Policy.[8]

As the parties have engaged in extensive briefing of the facts in this matter, and as uncontested facts on summary judgment are deemed admitted, Plaintiff should be foreclosed from now arguing that facts are disputed in an attempt to create unfair surprise at trial. Moreover, against the backdrop of the dispositive facts deemed admitted and Great American's motion to preclude Plaintiff from offering any expert evidence or testimony at trial given her failure to disclose any experts under FRCP 26(a), the Court should consider whether there is any reason to proceed to a trial on Plaintiff's remaining claims.[9]

II. Argument.

1. Facts that Plaintiff failed to contest at summary judgment under Local Rule 56-1.

The Court should not allow Plaintiff to dispute facts when those facts have already been admitted.[10] Plaintiff admitted most, if not all of Great American's proffered facts.[11] These facts include, but not are not limited to:[12]

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[7] *See id.*
[8] *See id*. at PageID Nos. 7071-7076.
[9] *See* Great American's Motion and Memorandum to Limit or Preclude Expert Testimony at Trial, Dkt Nos. 126 and 127; *see also* Great American's Trial Brief.
[10] *See* SD LR 56-1(f)(1).
[11] *Compare* in Great American's Memorandum in Support of its Motion for Summary Judgment, Dkt. No. 51-2, at PageID No. 977-988 *with* Plaintiff's Combined Brief in Response to Defendant's Motion for Summary Judgment at Dkt. No. 80, at PageID No. 4208-4209 (stating, without citation to admissible evidence as required by Local Rule 56-1, that five facts were disputed because they are "legal conclusions").
[12] The citations to evidentiary support for the following list of facts are contained in Great American's Memorandum in Support of its Motion for Summary Judgment, Dkt. No. 51-2, at footnotes 5 through 65.

- The Mortality Policy required Plaintiff to give "IMMEDIATE NOTICE"[13] to Great American "OF ANY OCCURRENCE WHICH COULD RESULT IN A CLAIM" involving Thomas by providing:

> IMMEDIATE NOTICE OF ANY OCCURRENCE WHICH COULD RESULT IN A CLAIM INVOLVING ANY ANIMAL INSURED UNDER THIS POLICY MUST BE GIVEN BY YOU, YOUR REPRESENTATIVE, OR OTHER PERSONS WHO HAVE CARE, CUSTODY AND CONTROL OF SUCH ANIMAL.
> NOTICE IS TO BE GIVEN TO GREAT AMERICAN INSURANCE - EQUINE OPERATIONS CALL 24 HOURS 1-800-331-0211. PLEASE ADVISE POLICY NUMBER, NAME OF INSURED, AND ANIMAL INVOLVED, ALSO INCLUDE A TELEPHONE NUMBER TO CONTACT WHERE THE ANIMAL IS LOCATED.
> GENERAL CONDITION 6 OF THE POLICY STIPULATES THE REQUIREMENTS FOR TREATMENT OF SICKNESS OR INJURY TO AN INSURED ANIMAL. THESE STIPULATIONS MUST BE ADHERED TO IMMEDIATELY WHEN THE CONDITION OR INJURY IS OBSERVED OR KNOWN.
> IT IS ESSENTIAL TO CONFORM TO ALL THE ABOVE REQUIREMENTS SINCE FAILURE TO DO SO WILL INVALIDATE ANY CLAIM UNDER THIS POLICY.
>
> (Emphasis supplied).

- The Mortality Policy expressly disclaimed coverage unless Plaintiff gave "immediate notice to [Great American] of [any] accident, injury, illness, lameness condition or lameness injury, disease, or physical disability of any kind":

> **VI. CONDITIONS PRECEDENT**
> **EACH OF THE FOLLOWING IS A CONDITION PRECEDENT TO ANY LIABILITY BY US UNDER THIS POLICY. ANY FAILURE TO SATISFY ANY ONE OR MORE OF THESE CONDITIONS PRECEDENT, OR OF ANY CONDITION PRECEDENT IN ANY ENDORSEMENT TO THIS POLICY, IN RESPECT OF ANY "HORSE," LOSS, OR CLAIM, WILL INVALIDATE COVERAGE IN RESPECT OF THAT "HORSE," LOSS, OR CLAIM AND WILL RELEASE US FROM ALL LIABILITY IN RESPECT OF THAT "HORSE," LOSS, OR CLAIM.**
> . . .
> **F. Your Duties In The Event Of Accident, Injury, Illness, Lameness Condition Or Lameness Injury, Disease, Or Physical Disability**

[13] At her deposition, Plaintiff confirmed that her understanding of "immediate" is: "**right then**." *See* Deposition of Julie Greenbank, June 19, 2019 ("Plaintiff Depo. I"), attached hereto as **Exhibit 1**, at 194:5-10.

> It is a condition precedent of any liability by us under this policy that, in the event of any accident, injury, illness, lameness condition or lameness injury, disease, or physical disability of any kind of or to a "horse," you do each and every one of the following or have it done by another:
> . . .
> 2. Give immediate notice to us of the accident, injury, illness, lameness condition or lameness injury, disease, or physical disability of any kind. Such notice should be given by telephone to us at our **24 HOUR EQUINE OPERATIONS CALL NUMBER: 1-800-331-0211**, and must include (a) a description of the accident, injury, illness, lameness condition or lameness injury, disease, or physical disability and (b) the name and contact information of the "qualified veterinarian" caring for the "horse;"

- The Policy also guaranteed Great American's right "to assume control over the treatment of [Thomas]," in which case Plaintiff was required to "allow [Thomas] to be removed for such treatment."
- **Plaintiff and her agents were fully aware of Thomas' declining health and medical issues in February and March 2018, but Plaintiff did not give notice to Great American until April 26, 2018.**
- As early as February 2018, Thomas began experiencing numerous health issues.
- Plaintiff's veterinarian, Dr. Raymond Stone ("Dr. Stone"), testified that on February 12, 2018 he treated Thomas for colic which can be a deadly condition, and that on February 15, 2018, he diagnosed Thomas with bilateral pleural pneumonia which can also have serious complications, including death.
- Dr. Stone determined that Thomas' particular pneumonia was bacterial.
- Dr. Stone testified that based on his conversations with Mr. Herbert, Plaintiff was aware of Thomas' pneumonia in February.
- Indeed, text messages between Plaintiff and Mr. Herbert demonstrate that Plaintiff was aware as early as February 15, 2018 that Thomas had pneumonia and was on "heavy antibiotics."

- Mr. Herbert further testified that he recommended to Plaintiff on February 26, 2018 that she reach out to Great American regarding Thomas' health.
- Thomas' pneumonia continued through the next month; on March 6, 2018, Chuck Herbert, Thomas' trainer, ("Mr. Herbert") sent a text message to Plaintiff and told her that Thomas had a "lot of congestion . . . in his trachea."
- By the end of March, Dr. Stone determined that Thomas' condition had gone "systemic" and that Thomas was "very sick."
- In fact, Dr. Stone noted numerous ailments that Thomas had suffered through March:

> Q By the end of March, you and Chuck both knew that you suspected an abscess due to the exudate and odor when Thomas was coughing, correct?
> A And from the scope, yes.
> Q By the end of March, the horse had lost 250 pounds or more, correct?
> A 200 to 250, yes.
> Q By the end of March, the pneumonia had gone systemic, correct?
> A Correct.
> Q By the end of March, [Thomas] had cellulitis in all four legs, correct?
> A Correct.
> Q By the end of March, you were concerned about developing laminitis,
> A Correct.
> Q By the end of March, you recommended referring the horse to a referral
> A Correct.
> Q --right?
> A Correct.
> Q You told Julie Greenbank that you recommended a referral, correct?
> A Correct. I spoke with Julie.
> Q And by the end of March, you had mentioned to at least Chuck, that the insurance company should be made aware of Thomas' condition, right?
> A I'd asked, yes, if they had been notified and needed to be aware, yes.

- Thomas had also developed uveitis in his eyes – another indication that Thomas' original issues had spread and become systemic.

- Mr. Herbert confirmed Dr. Stone's account of the numerous conditions Thomas had suffered through the end of March, and further testified that Plaintiff was aware of Thomas' status as well:

> Q So by the end of March Thomas' original pneumonia had gone systemic, correct?
> A That's correct.
> Q And at that time you shared Julie was aware of the ongoing treatment of Thomas, correct?
> A Yes.
> Q And you discussed these issues with her, correct?
> A Yes.
> Q In fact at one-point Dr. Stone asked you whether or not the owner was aware of the treatment, correct?
> A I'm sure he did.
> Q And you would have said to him she's up to date?
> A Right.
> Q And by the end of March she was up to date, correct?
> A That's correct.
> Q And in fact she was nervous and scared about Thomas, correct?
> A Sure.
> Q And during the whole process she was afraid that she was going to lose her horse, correct?
> A That's correct.

- As Plaintiff concedes, by late March, Thomas was "pretty darn sick" and in "critical condition."
- Accordingly, Dr. Stone recommended to Plaintiff and Mr. Herbert that given the horse's condition, they should consider transporting Thomas to a referral hospital.
- Dr. Stone further testified that around that same time, he asked Mr. Herbert whether Thomas' insurance company "had been notified" of Thomas' condition and that the insurance company "needed to be aware."
- Moreover, on March 26, 2018, Plaintiff asked Mr. Herbert whether Thomas' medical bill was "something I file with insurance?"

- On that same date, Mr. Herbert answered "Yes, let's talk about that[.]"
- As a result of the numerous health issues Thomas had endured, Dr. Stone estimated that by April 1, Thomas had lost an astounding two hundred to two hundred and fifty pounds – approximately 17 to 22 percent of Thomas' weight today.
- During this entire period, **Plaintiff, her trainer, and her veterinarian, were aware of Thomas' numerous conditions, knew they should report these conditions, and failed to report any of them in February or March 2018 to Great American, as required by the Policy**.
- Plaintiff – for the first time – reported Thomas' pneumonia to her insurance agent, who contacted Great American on or about April 26, 2018.
- Plaintiff omitted important facts regarding the true nature of Thomas' health status. On May 3, 2018, Plaintiff spoke with Charlotte Bloxsom, a claims representative for Great American. During this conversation, Plaintiff represented to Ms. Bloxsom that Thomas had originally dealt with pneumonia, but that Thomas "ha[d] since recovered and [was] back in training."
- In reality, **as Plaintiff later testified, Thomas "had been sick continuously from February until June 5."**
- On May 7, 2018, just days after representing to Ms. Bloxsom that Thomas had recovered and resumed training, Plaintiff explained to Mr. Herbert: "[Thomas was] limping worse on that back leg, and I was afraid to have him walk on it. Also, [Thomas] was coughing. I am very scared."
- On May 10, 2018, Mr. Herbert told Dr. Stone "two days ago I didn't think [Thomas] was going to make it[.]"
- During the May 3, 2018 telephone call, Plaintiff wholly failed to mention that Thomas had also suffered eye issues, leg issues, and severe weight loss.

- Plaintiff never called Great American to tell Charlotte that Thomas was limpy on his right hind leg.
- Plaintiff never called Great American to tell Charlotte that she was afraid for him.
- Plaintiff never called Great American or to correct her prior statement that Thomas had "recovered" and was "back in training (when she knew "clearly" that he had not recovered and was not back in training)."
- **After May 10, 2018, Dr. Stone was not asked by anyone and did not examine Thomas again until nearly a month later on June 5, 2018.**
- In response to Thomas' illness, severe weight loss, and other issues that Dr Stone discovered, he contacted Great American on June 8 to inform Great American of Thomas' severe condition.
- Great American retained its own veterinarian named Dr. Nathan Slovis to provide consultation and treatment for Thomas in conjunction with Dr. Stone.
- Originally, Dr. Slovis recommended that Thomas be transported to a local clinic – preferably Dr. Stone's – for treatment as soon as possible.
- Dr. Stone later determined that it was in the best interest of Thomas to have him shipped to Dr. Slovis' facility.
- On or about June 8, 2018, Mr. Herbert transported Thomas to the Hagyard Equine Medical Institute ("Hagyard") in Lexington, Kentucky.
- During his treatment at Hagyard, Great American assumed control over the treatment of Thomas in accordance with the terms of the Policy, and to ensure that Thomas receive the care and treatment that he desperately needed.

- Plaintiff testified that she was "fine with" the decision to transport Thomas to Hagyard in Lexington.
- Dr. Slovis expressed concern about the lack of treatment Thomas had been receiving under Plaintiff's care.
- The veterinarians at Hagyard discovered that Thomas had a lung abscess that had never been treated, and a large amount of pus was drained from Thomas' lung.
- It was the opinion of Dr. Slovis and others at Hagyard that Thomas should have been referred to specialists months earlier and that Thomas had not received treatment for his abscess or hoof or feet issues.
- Thomas was "emaciated" by the time he reached Hagyard.
- Hagyard rated Thomas with a body score of 1, the lowest possible score he could have received.
- Despite Thomas' condition when he arrived at Hagyard, Thomas responded to treatment, and his condition has improved dramatically.
- When shown pictures and videos of Thomas' condition, even Plaintiff has conceded that Thomas now "looks good," "his weight is good," and "he is moving pretty good."
- Since his transport to Hagyard, Great American has paid for every medical bill and expense that Thomas has incurred for his treatment.

2. The Federal Rules of Civil Procedure permit facts admitted in the summary judgment stage to be treated as facts established in the case.

"If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g). As has been noted by several courts, the primary purpose of the rule is to salvage some results from the effort involved in the denial of a motion for summary judgment. *See e.g., Flynn v. Sandahl*, 58 F.3d 283, 288 (7th

Cir.1995) (A rule 56(d) judgment, which was the predecessor to Rule 56(g), can serve a useful brush-clearing function even if it does not obviate the need for a trial, and it may also facilitate the resolution of the remainder of the case through settlement). In as much as it narrows the scope of the trial, a Rule 56(g) order may be compared to a pretrial order under Rule 16. *See Ello*, WL 3956186, at *5 (using Rule 56(g) to admit facts where party did not respond in accordance with Local Rules to Statement of Material Facts in Summary Judgment Motion so trial could be expediated).

> The Local Rules of the Southern District of Indiana provide that:
>
> [T]he facts as claimed and supported by admissible evidence by the movant are admitted without controversy except to the extent that:
>
> (A) the non-movant specifically controverts the facts in that party's "Statement of Material Facts in Dispute" with admissible evidence; or
>
> (B) it is shown that the movant's facts are not supported by admissible evidence; or
>
> (C) the facts, alone or in conjunction with other admissible evidence, allow the court to draw reasonable inferences in the non-movant's favor sufficient to preclude summary judgment.

S.D. Ind. L.R. 56-1.

All of the facts listed above were admitted at the summary judgment stage. Plaintiff filed numerous summary judgment briefs, including: (1) a Response to Great American's original Motion for Summary Judgment; (2) a Surreply to Great American's Reply in support of Great American's Motion for Summary Judgment; (3) a Reply in support of her own Motion for Summary Judgment; (4) a Corrected Reply in Support of her Motion for Summary Judgment; (5) "Supplemental Documents" in support of her Motion for Summary Judgment; and (6) a Reply in Support of her Supplemental Documents in Support of her Motion for Summary Judgment. **Despite these numerous pleadings, not one of them contained a section properly disputing**

Great American's facts listed above. Given Plaintiff's repeated failure to dispute Great American's factual assertions in accordance with Local Rule 56-1, these facts should be deemed admitted, and Plaintiff should not be allowed to present contradictory evidence at trial.

3. Admission of these facts will support judicial economy, simplify the issues for trial, and assist in the resolution of this dispute.

Admission of these facts will also assist in judicial economy by limiting the issues, and likely the claims, at trial. The Court will not have to determine whether Plaintiff's notice was immediate because Plaintiff admitted she had knowledge of Thomas's serious illnesses for two months before providing any notice to Great American, and she did not provide notice of other serious conditions involving Thomas's eyes, lameness, and weight issues. Plaintiff has also admitted that "immediate" means: "**right then**."[14] The Court will not have to determine whether Plaintiff gave proper care and treatment to Thomas, as it is undisputed that Thomas was gravely ill. The Court will not have to consider whether Great American breached the Policy by approving the tenotomy because Great American had the right to approve such treatment, Plaintiff's Policy did not provide loss of use coverage, and Plaintiff has no evidence that more alternative treatments would have preserved Thomas's life and athleticism. The parties will not need to argue over whether Great American injured Thomas after the Policy terminated because Plaintiff confirmed that the averments in her Amended Complaint remain true: she is only claiming damages to Thomas due to the tenotomy, and **not** any treatment thereafter.[15]

By finding that all of the facts stated in Great American's Motion for Summary Judgment have been admitted by Plaintiff, and thus not at issue at trial, the Court will expedite the trial by excluding any testimony wherein Plaintiff might attempt to rehash these factual issues, which will

[14] Plaintiff Depo. I, attached hereto as **Exhibit 1**, at 194:5-10.
[15] *See* Deposition of Julie Greenbank, June 10, 2020 ("Plaintiff Depo. II"), attached hereto as **Exhibit 2**, at 6:16-7:17.

limit factual disputes and reduce jury confusion as to what facts are actually contested between the parties. Finding these facts admitted would increase the likelihood of settlement by clarifying what is at issue at trial. Indeed, given these admitted facts, coupled with Plaintiff's failure to disclose any expert opinion evidence and her recent admission that her claim for damage to Thomas is limited to the tenotomy, the Court may also consider whether there is any need for a trial on Plaintiff's remaining claims.[16]

III. Conclusion

A ruling in accordance with Federal Civil Rule 56(g) and S.D. Ind. L.R. 56-1 would preserve judicial economy at trial because Plaintiff would be prevented from introducing any evidence to controvert the facts that she already admitted without controversy. When combined with Plaintiff failing to offer any expert evidence that she provided proper care and attention to Thomas, or that that there were more conservative treatments for Thomas's laminitis, Plaintiff's contract claims (and related bad faith claims) fail completely. Plaintiff alleges that the tenotomy was what caused her damage. The Court has ruled that the Plaintiff is not entitled to loss of use and Great American offered undisputed proof that the Policy provides that Great American can assume control of the horse for its care and treatment. The ruling would also make clear that Plaintiffs are seeking a damages recovery of $1,780.53 in allegedly unpaid veterinary expenses and $1,943.00 for issuance of a short-term renewal of the Policy, along with whatever damages are allowable under Indiana law for those claims. Clarification of what factual issues remain for the factfinder to determine would greatly expediate the trial and likely push the parties to settlement.

[16] *See* Great American's Motion and Memorandum to Limit or Preclude Expert Testimony at Trial, Dkt Nos. 126 and 127; *see also* Great American's Trial Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically via the Court's ECF system on July 20, 2020, and will be served on the following via the Court's ECF system:

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